Supreme Court, U.S.
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No. 04- ____

In the Supreme Court of the United States

DAVID F. ALBRIGHT,

Petitioner,

v.

NEIGHBORHOOD DEVELOPMENT COLLABORATIVE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Fourth Circuit err in affirming a non-monetary Rule 11 sanction, directed to an argument concerning jurisdiction of the person under F.R.C.P. Rule 4(k)(1)(A) where the issue is clearly not frivolous in view of the actual wording of Rule 4(k)(1)(A) and applicable Maryland rules?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption Petitioner is unaware of any publicly traded company owning Neighborhood Development Collaborative.

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OPINIONS BELOW

The July 22, 2004 opinion of the United States Court of Appeals for the Fourth Circuit is not reported but is reprinted at App. 1a – 2a; the Maryland District Court's Memorandum to Counsel is not reported but is represented at App 3a – 4a.

STATEMENT OF JURSIDICTION

The Fourth Circuit issued its opinion on July 22, 2004. This petition for certiorari is timely in that Petitioner has filed it within 90 days of July 22, 2004. The Court has jurisdiction pursuant to 28 U. S. C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

This case involves the application of Rule 11, in a non-monetary manner, where the District Court concedes that the acts of Petitioner did not increase the costs of the Rule 11 movants. *See* App. 4a (fn.) This case also involves the interpretation and application of Federal Rules of Civil Procedure, Rule 4(k)(1)(A).

Civil Procedure Rule 4 (k)(1)(A) provides:

> (k) Territorial Limits of Effective Service.
>
> (1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant
>
> (A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located.

STATEMENT OF THE CASE

I. Overview of the Case

This case involves a non-monetary Rule 11 sanction entered by the District Court against the Petitioner. The Fourth Circuit panel, in a one-page opinion, affirmed per curiam without any discussion of the jurisdictional issue raised both in the District Court and the Circuit Court.

II. Background of the Case

The Petitioner attorney has asserted throughout the litigation between Neighborhood Development Collaborative and Morton L. Ginsberg that the U. S. District Court had no jurisdiction over the Defendant by reason of the Respondents failure to comply with Rule 4 (k)(1)(A) of the Federal Rules of Civil Procedure. Neither the District Court nor the Fourth Circuit provided any reasons for their failure to apply Rule 4(k)(1)(A) and dismiss the case.

III. Proceedings Below

The opinions of the District Court and the Circuit Court, App. 1 through 4, reflect the proceedings below. It should be noted that the motion to dismiss on jurisdictional grounds was not decided by the Court until final judgment, at which time the Court ruled on all outstanding matters.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that a "United States court of appeals has decided an

important question of federal law... that conflicts with relevant decisions of this Court." In addition the Court considers whether the court of appeals decision "has so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's supervisory power...."

Both of these considerations are present in this case.

As stated in the Petition of Ginsberg, filed simultaneously with this petition, Federal Rule 4(k)(1)(A) requires, in this type of case, that the jurisdictional requirements as to territorial limits for effective service of the state where the district court is located control – i.e., Maryland law. The decisions below are unsound since Federal Rule 4(k)(1)(A) specifically requires that the service and summons be in accordance with Maryland law. This acts as a specific exception to the general 20-day answer rule (and there are other exceptions as well). However, since Federal Rule 4(k)(1)(A) specifically directs that state law applies, then that state's long-arm requirements and the state rules for summons and responding (60-day) are applicable. Maryland Rule 2-321(b) provides for a 60-day time to answer; and Maryland Rule 2-114(b) requires that the summons "contain" the "time within which the defendant must file a response to the complaint." Since the summons was incorrect as to the time designated, there was not only a failure to properly serve, but the papers that were attempted to be served were defective and insufficient. The argument that somehow the Maryland rules are not Maryland "law" is rejected by Maryland courts. *Hauver v. Dorsey*, 228 Md. 494 (1962).

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) has relevance for resolving a conflict situation between Federal and State rules. In the *Walker* case, the Court had the

question before it as to whether Federal Rule 3, which states that a civil action commences on the date of the filing of the Complaint overrides a state rule that provides that a civil action commences when service is first made upon the Defendant. (This issue, which arises in a number of States, has a bearing on the effect of the applicable statute of limitations.) The Supreme Court said the question was a difficult one and after extensive analysis determined that the State's rule as to when a case commences would control and override Federal Rule 3. Neither the District Court not the Fourth Circuit responded to this argument.

In the case at bar, while a different Federal rule is involved, the same basic issue still exists that confronted the Supreme Court in *Walker v. Steel Corp.*, 446 U.S. 740 (1980). However, in the case at bar, the issue of resolving any conflict appears to be much more easily determined in view of the actual language of Federal Rule 4(k)(1)(A). Federal Rule 4(k)(1)(A) carves out an exception where Maryland long arm requirements must be met. Federal Rule 4(k)(1)(A) solves the supposed conflict by stating in so many words that you look to the state where the District Court sits to ascertain what a Court of General jurisdiction of that state (Maryland in this instance) would have to do to establish long arm jurisdiction. Further help in this analysis is *Wade v. Danek Medical*, 182 F.3d 281 (4th Cir 1999) where the Fourth Circuit (at 288-289) quoting in part from *Walker v. Armco Steel Corp.*, 416 U.S. 740, where it reasoned that it would look to state law not just for the applicable statute of limitations, but also for any rule, such as a service rule that constituted "an integral part of the state statute of limitations." See page 288, *Wade v. Danek*, supra.

The Fourth Circuit in *Wade v. Danek Medical*, 182 F.3d 281 (4th Cir. 1999) made a point that a pivotal reason for

favoring the state rule over the federal rule is to prevent forum shopping by a Plaintiff in a diversity action and to avoid an inequitable administration of the law. See footnote 10, page 288, *Wade v. Danek Medical*, supra. The difference of time to answer, 60 days for Maryland and 20 days for the Federal District Court, certainly will encourage forum shopping by plaintiffs if this case is upheld by the Supreme Court.

As far as Petitioner, Albright, in this case is concerned, since it is his actions in making the above jurisdictional argument that is the essential basis for the criticism by the District Court, which then entered non-monetary sanctions against him, upon a showing that said jurisdictional arguments are not frivolous, the sanctions must be vacated, and reversed.

CONCLUSION

The petition for writ of certiorari should be granted. The territorial limits of service is an important issue. Forum shopping in State law issues, with diversity jurisdiction, should not be encouraged.

The Petitioner, Albright, presented sound arguments on jurisdictional grounds, and Rule 11 sanctions, even if non-monetary, should not be imposed, and it was reversible error to do so.

Respectfully submitted,

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October 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2412, No. 04-1060

[Filed July 22, 2004]

NEIGHBORHOOD DEVELOPMENT COLLABORATIVE,
Plaintiff-Appellee,

v.

MORTON L. GINSBERG,
Defendant-Appellant.

DAVID F. ALBRIGHT,
Plaintiff-Appellant,

v.

NEIGHBORHOOD DEVELOPMENT COLLABORATIVE,
Plaintiff-Appellee,

and

MORTON L. GINSBERG,
Defendant.

Appeals from the United States District Court
for the District of Maryland, at Baltimore
(CA-03-1552-1-AMD)
Andre M. Davis, District Judge

Before TRAXLER, SHEDD, and DUNCAN, Circuit Judges.

PER CURIAM:

In Appeal No. 03-2412, Morton L. Ginsberg appeals the district court's order denying his motion to dismiss for lack of personal jurisdiction and granting summary judgment in favor of Neighborhood Development Collaborative ("NDC") in NDC's declaratory judgment action. Ginsberg also appeals the court's order denying his motion filed pursuant to Fed. R. Civ. P. 59(e). In Appeal No. 04-1060, Ginsberg's attorney, David F. Albright, appeals the district court's order imposing sanctions against him in the form of a reprimand. We have reviewed the parties' briefs and the joint appendix and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *See Neighborhood Dev. Collaborative v. Ginsberg*, No. CA-03-1552-1-AMD (D. Md. Sept. 2, 2003; Oct. 7, 2003; Nov. 22, 2003). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Chambers of Andre M. Davis
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November 22, 2003

MEMORANDUM TO COUNSEL

RE: Neighborhood Development Collaborative v. Ginsberg
Civil No. AMD 03-1552

The briefing on the plaintiff's motion for sanctions has been read and considered (not including defendant's improper surreply memorandum, which was filed in blatant violation of Local Rule 105.2.a ("Unless otherwise ordered by the Court, surreply memoranda are not permitted to be filed."). Not only do I adhere to my previously - expressed view that much of defendant's contentions in this peculiar case were "frivolous" and "spurious," even more fundamentally, I find defense counsel's performance in this case is, with all due respect, an embarrassment to him, his firm and his client. In my view, under the unique circumstances presented here, this finding is

an adequate "sanction." *See* Fed.R.Civ.P. 11(c)(2)("A sanction . . . shall be limited to what is sufficient to deter repetition of such conduct . . . ."). I decline to make an award of attorney's fees as a monetary sanction.*

I note that defendant has taken an appeal; I presume that plaintiff will seek sanctions from the Fourth Circuit. From the perspective of this court, monetary sanctions on appeal would certainly be appropriate.

Very truly yours,

/s/_____
Andre M. Davis
United States District Judge

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* If, instead of a resort to a bizarre, indeed, marginally comprehensible, motion to dismiss, and reliance on an inadequate Rule 56(f) affidavit, defendant had simply answered the amended complaint by denying the material allegations, proceeded with discovery under a proper scheduling order, and litigated the case in a rational manner, plaintiff's attorney's fees actually would have exceed those incurred. Thus, defendant's unreasonable litigation tactics actually reduced the fees incurred by plaintiff had the case simply gone forward in the ordinary course.